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Corporation; Polo Retail, LLC; Polo Ralph Lauren Corporation,
doing business in California as Polo Retail Corp.; and Fashions
Outlet of America, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANN OTSUKA, an individual; JANIS
KEEFE, an individual; CORINNE PHIPPS,
an individual; and JUSTIN KISER, an
individual; and on behalf of all other similarly
situated,

Plaintiff(s),

v.

POLO RALPH LAUREN CORPORATION,
a Delaware Corporation; POLO RETAIL,
LLC, a Delaware Corporation; POLO
RALPH LAUREN CORPORATION, a
Delaware Corporation, doing business in
California as POLO RETAIL CORP;
FASHIONS OUTLET OF AMERICA, INC.,
a Delaware Corporation and DOES 1-500,
inclusive,

Defendant(s).

Case No. C07-02780 SI

**DECLARATION OF EVAN COHEN IN
SUPPORT OF DEFENDANTS' OPPOSITION
TO PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION**

Date: July 11, 2008
Time: 9:00 a.m.
Dept: Courtroom 10, 19th Fl.
Judge: Hon. Susan Illston

1 I, Evan Cohen, declare:

2 1. I am Manager of Retail Store Operations for Polo Ralph Lauren Polo Ralph Lauren
3 Corporation ("Polo") and Rugby. I have served in this position since approximately July 2005.
4 Previously, I held the position of Retail Store Operations Analyst, from approximately October 2003
5 - July 2005. Prior to this position, I held the position of Corporate Compensation Analyst from
6 October 1999 - October 2003.

7 2. I have personal knowledge of the matters set forth below and if called as a witness, I
8 could and would competently testify to as set forth below.

9 3. In my position of Manager of Retail Store Operations, I am responsible for
10 strategizing, analyzing the business, including employee compensation, and ensuring the efficiency
11 of operations. My duties and responsibilities have largely been the same since I was a Retail Store
12 Operations Analysis, beginning in approximately October 2003.

13 4. I have responsibilities that include all of California's Ralph Lauren stores ("Full-Price
14 Stores") located in San Francisco, Burlingame, Palo Alto, La Jolla, South Coast Plaza, Beverly Hills,
15 Palm Desert and Malibu (including all three Malibu stores: Men's, Women's and RRL). In
16 California, I also have responsibilities for Polo Rugby ("Rugby"), which has California stores located
17 in San Francisco and Palo Alto.

18 **ARREARS PROGRAM**

19 5. On April 18, 2004, Polo introduced an arrears program to its Full-Price Stores,
20 including all Full-Price Stores in California. The arrears program only applied to all new sales
21 associates hired after April 18, 2004. Employees hired prior to this date were not subject to the
22 arrears program. The arrears program was an incentive program developed by Polo to encourage
23 sales associates to meet their sales goals. The arrears program was terminated on March 25, 2006.

24 6. From April 18, 2004 - March 31, 2005, all sales associates who were subject to the
25 arrears program, with the exception of sales associates working in the home collections department,
26 had a 1 month grace period. Sales associates in the home collections department were given a 2
27 month grace period. From April 1, 2005 - March 25, 2006, when the arrears program was terminated,
28 all sales associates who were subject to arrears program, with the exception of sales associates

1 working in the home collections department, were given a 3 month grace period. Sales associates in
2 the home collections department were given a 6 month grace period. During the grace period, sales
3 associates' commissions were not subject to arrears.

4 7. Under the arrears program, in order for a sales associate to earn commission (i.e., net
5 commissions exceed their base pay for the pay period), the sales associate must have sold a sufficient
6 amount of Polo merchandise, at their commission rate, that created commissionable sales sufficient to
7 cover their base pay for the pay period. When a sales associate failed to cover his/her base pay for a
8 given pay period, the sales associate's minimum sales expectation for the following pay period,
9 which must be satisfied prior to being able to generate commission earnings, increased in the next
10 pay period by the amount the sales associate fell short. Under the arrears program, a sales associate
11 was always paid his/her draw, or base pay, regardless of the amount of merchandise he/she sold.

12 8. For example, if a sales associate is paid a draw, or base rate, of \$12/hour and works 40
13 hours a week, he/she has a base pay of \$960 a pay period.¹ Therefore, a sales associate who earns an
14 8% commission must sell at least \$12,000 of Polo merchandise in order to cover his/her base pay for
15 a given pay period. The minimum sales expectation for the pay period, in this example, is defined as
16 \$12,000. Under the arrears program, if the sales associate only sold \$10,000 of Polo merchandise, in
17 the next pay period, the minimum sales expectation would be increased by \$2,000, the amount the
18 sales associate fell short of his/her minimum sales expectation. The threshold for being able to earn
19 commission therefore increased to \$14,000 in the subsequent pay period, increasing the minimum
20 sales expectation.

21 9. Therefore, under the example described above, even if a sales associate were to sell
22 \$16,000 of Polo merchandise in the subsequent pay period, he/she would not generate commission
23 earnings above the minimum sales threshold of \$12,000. Rather, the sales associate would generate
24 commission earnings above \$14,000.

25 10. I was responsible for determining which sales associates fell into arrears and how to
26 account for those situations. The accounting application of the arrears program reflects a deduction
27

28 ¹ A pay period is the equivalent of two weeks.

1 to commissions, which were applied to satisfy the adjusted minimum threshold for earned
2 commissions, even though there was not a deduction for any amount a sales associate was entitled to
3 receive in earned commissions under the arrears program.

4 **50 % TEST FOR EXEMPTION FROM OVERTIME**

5 11. In California, I understand that an employee is exempt from overtime pay regulations
6 if the employee's earnings exceed one and one-half (1-1/2) times the minimum wage if more than
7 half of that employee's compensation represents commissions. Polo's policy is to perform
8 "reconciliations" on an annual basis for each sales associate in order to determine if more than half of
9 the compensation of each sales associate represents commissions.

10 12. Polo performs the reconciliations yearly because Polo has determined that a period of
11 one year in the retail industry is the period which best typifies the total characteristics of each
12 employee's earning pattern. Using one-year period for its reconciliations prevents anomalous results
13 that would occur as a result of seasonal fluctuations in retail business.

14 13. Polo inadvertently failed to perform reconciliations prior to 2007. In 2007, Polo
15 became aware that reconciliations had not been performed. Upon discovering that reconciliations
16 had not been performed, I undertook reconciliations for 2003, 2004, 2005, 2006 and 2007. For each
17 year, I looked at all sales associate's compensation data and determined if more than 50 percent of
18 each sales associate's compensation was comprised of commissions. If a sales associate did not meet
19 the 50 percent requirement for any given year, then I examined each pay period worked by that sales
20 associate during the year to determine if overtime wages were owed. Polo then paid overtime for all
21 periods where the sales associate was owed overtime wages. Polo also paid the sales associates
22 interest on all owed overtime wages.

23 14. A true and correct copy of my reconciliation calculations, based upon payroll records,
24 is attached hereto as Exhibit A. This document has been Bates-labeled POLO 02058-02122 and was
25 introduced as Exhibit 53 during my deposition.

26 15. I determined that in Fiscal Year 2003, the total number of employees whose
27 commissions represented 50% or less of total annual compensation was 4. Polo paid those 4
28 employees a total sum of \$73.40, plus interest. See Exhibit A at 2059.

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1 16. I determined that in Fiscal Year 2004, the total number of employees whose
2 commissions represented 50% or less of total annual compensation was 7. Polo paid those 7
3 employees a total sum of \$138.06, plus interest. See Exhibit A at 2070.


4 17. I determined that in Fiscal Year 2005, the total number of employees whose
5 commissions represented 50% or less of total annual compensation was 9. Polo paid those 9
6 employees a total sum of \$190.35, plus interest. See Exhibit A at 2071

7 18. I determined that in Fiscal Year 2006, the total number of employees whose
8 commissions represented 50% or less of total annual compensation was 11. Polo paid those 11
9 employees a total sum of \$537.63, plus interest. See Exhibit A at 2115.

10 19. I determined that in Fiscal Year 2007, the total number of employees whose
11 commissions represented 50% or less of total annual compensation was 7. Polo paid those 7
12 employees a total sum of \$231.56, plus interest. See Exhibit A at 2117.

13 20. The total number of Polo sales associates whose commissions represented 50% of less
14 of their annual compensation from 2003 to 2007 was 38. The payments for 2003 to 2007 totaled
15 \$1,171.00.

16 I declare under penalty of perjury under the laws of the State of California that the foregoing
17 is true and correct. Executed this 17 day of June, 2008.

18 
19 _____
20 Evan Cohen